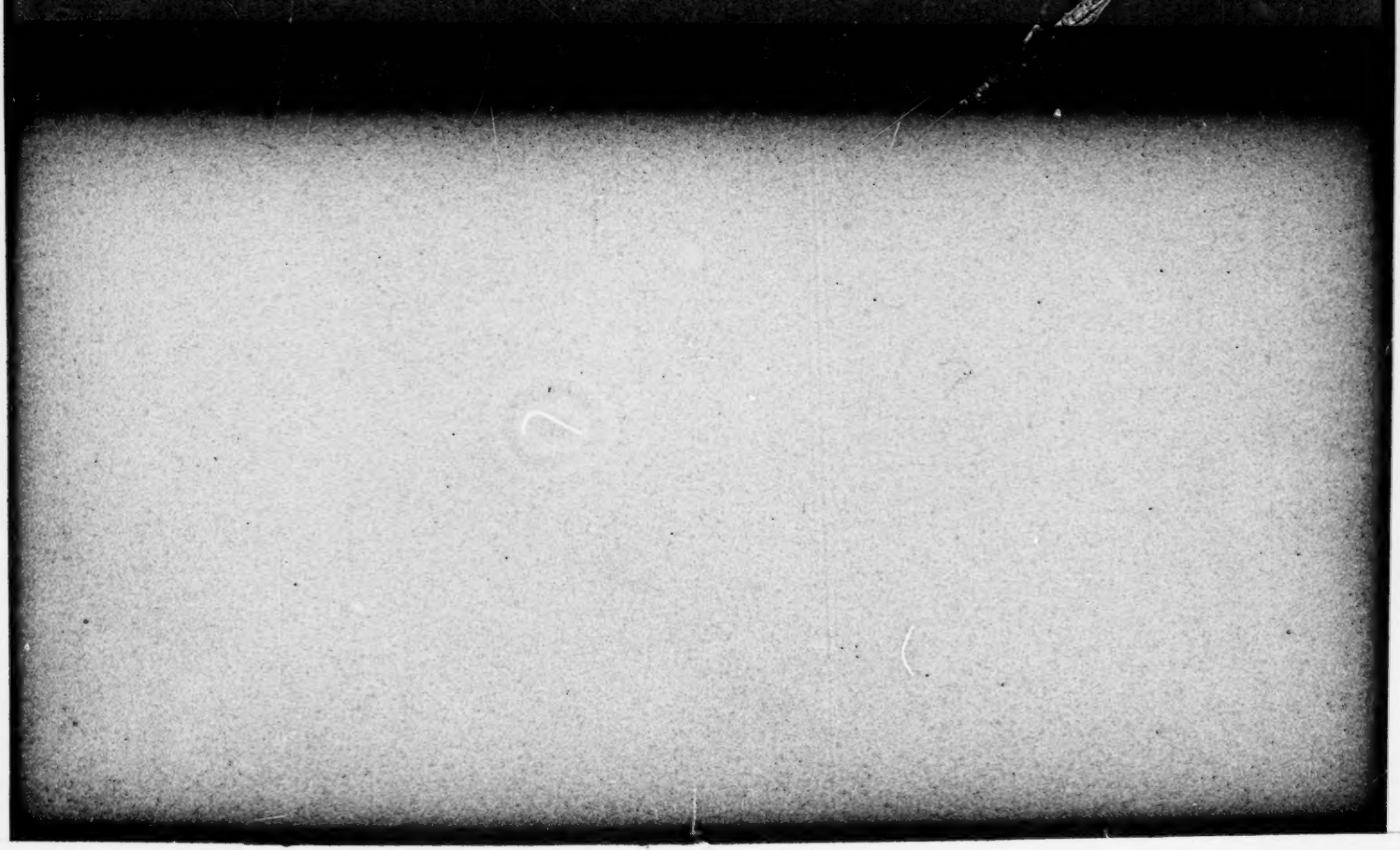

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1974

No. _____

IN RE GRAND JURY APPEARANCE
OF ALVIN S. MICHAELSON, ESQ.

AMICI CURIAE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INTERESTS OF THE AMICI CURIAE

A number of attorney associations have joined together to file this amicus curiae brief in support of the petition for a writ of certiorari to this Court filed by the petitioner, Alvin S. Michaelson, Esquire, on 11 February 1975. Never before in our knowledge has there been a case such as this in which an attorney has been subpoenaed to testify before the grand jury in order to provide information for a prosecution based upon communications with his client. Each of the following organizations find the majority opinion of the Ninth Circuit Court of Appeals in the case below to be a disturbing erosion of the attorney-client relationship and thus join in this brief: the American Civil Liberties Union of Northern California and Southern California; the California Attorneys for Criminal Justice; the Coalition to End Grand Jury Abuse; the California Public Defenders Association; the California Trial Lawyers Association; Federal Defenders of San Diego, Incorporated; the National Association of Criminal Defense Lawyers; the National Lawyers Guild; the National Legal Aid and Defender Association; the San Diego County Bar Association; and the San Diego Criminal Defense Lawyers Club.

QUESTION PRESENTED

1. Whether the Fifth and Sixth Amendment guarantees against self-incrimination and the effective assistance of counsel, as well as the attorney-client privilege and relationship, preclude grand jury questioning of a client's attorney concerning attorney-client communications for the purpose of gathering evidence to prosecute the client?

STATEMENT OF THE CASE [1]

Petitioner Alvin S. Michaelson, Esq., an attorney representing Brenda Sibson, was held in contempt on 5 December 1974 by the Honorable Bruce R. Thompson, a district judge of the District of Nevada based upon his refusal to answer questions before the grand jury.

The facts leading to this alleged contempt are quite simple. Mr. Michaelson was retained to represent Brenda Sibson. Ms. Sibson had been subpoenaed to testify before the grand jury, refused to answer questions on Fifth Amendment grounds, was granted use immunity under 18 U.S.C. § 6002 and thereafter called before the grand jury. Subsequently, her attorney, petitioner, was subpoenaed before the same grand jury and was told by James Duff, Esq., of the Department of Justice, that his answers would be used, if possible, to incriminate Ms. Sibson on the substantive offenses underlying the grand jury investigation or to demonstrate that Ms. Sibson had perjured herself before the grand jury.[2] Mr. Michaelson refused to so testify[3] based upon, inter alia, his client's Fourth, Fifth and Sixth Amendment rights, the attorney-client privilege and his ethical responsibilities as counselor to Ms. Sibson and attorney licensed to practice in

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1 The amici adopt the jurisdictional statement and argument of petitioner. Letters of consent for the filing of this brief are on file with the clerk of the Court.

2 Petitioner's petition at 9.

3 The questions which petitioner declined to

the State of California. The district court rejected petitioner's arguments, held Mr. Michaelson in contempt under 28 U.S.C. § 1826, and ordered him confined until he answered the questions, or until the grand jury had expired. The Ninth Circuit Court of Appeals, by a two-to-one vote, affirmed the contempt holding and Mr. Michaelson petitioned this Court on 11 February 1975 for a writ of certiorari to review that decision.

REASONS FOR GRANTING THE WRIT

1. The Fifth and Sixth Amendment guarantees against self-incrimination and the effective assistance of counsel, as well as the attorney-client privilege and relationship preclude grand jury questioning of a client's attorney concerning attorney-client communications for the purpose of gathering evidence to prosecute the client.

The issue presented in the petition for a writ of certiorari by petitioner Alvin S. Michaelson, Esquire is fundamental to the future of the relationship between an attorney and client. Involved in this question are the Fourth, Fifth and Sixth Amendments, the attorney-client

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3 cont'd. respond to may be found at pages 4-5 of the slip opinion of the Ninth Circuit majority decision. They concerned the fee arrangement between petitioner and his client as well as questions concerning who referred Ms. Sibson to petitioner.

privilege and the effect of rules regulating attorney conduct. Petitioner considers these protections individually in arguing the case against compelling an attorney to give testimony concerning client communications for use against his client. The amici reach the same result by an alternate route; that is, that the various constitutional protections, the attorney-client privilege, and rules guiding attorney professional practice combine to protect the attorney-client relationship from the threat of invasion posed by grand jury inquisition. It is this relationship and the reasonable privacy expectations in entering it, which shield both attorney and client from punishment for refusing to discuss the communications which created it.

In United States v. Judson, 322 F.2d 460, 467 (9th Cir. 1963), the Ninth Circuit recognized that: "No other third party, nor agent, nor representative, stands in such a unique relationship between the accused and the judicial process as does his attorney. . . . the attorney and his client are so identical with respect to the function of evidence and to the proceedings which call for his protection that any distinction is sophistry." (Emphasis added).

As Ms. Sibson's attorney, petitioner was subpoenaed to testify before the grand jury and answer questions which Ms. Sibson had been asked. With admirable candor, the government confessed below that the purpose of the inquiry of Ms. Sibson's attorney was to use his testimony in a possible perjury prosecution or as part of a prosecution for the substantive crimes under investigation. Irrespective of the violation of Ms. Sibson's Fifth Amendment rights or the attorney-client privilege, this use of the grand jury process to extract incriminating information from one's own counsel strikes at the heart of

the attorney-client relationship by denying the client the effective representation of counsel of her choice under Powell v. Alabama, 287 U.S. 45 (1932), and perhaps any representation at all. [American Bar Association Disciplinary Rule 5-102 (lawyer must withdraw from representation when it is apparent he will become a witness in his client's case); see also United States v. Crockett, 506 F.2d 759 (5th Cir. 1975) (lawyer must cease defense participation as soon as he learns he is to become a prosecution witness)].

There is an unquestioned overlap in this area between the protections guaranteed by the Fifth Amendment privilege, the attorney-client privilege and the Sixth Amendment protection of the attorney-client relationship; clearly, the most compelling reason for disallowing grand jury interrogation of a defense attorney concerning the nature of his relationship with his client is grounded in the unique quality of the attorney-client relationship. A client has a legitimate and reasonable expectation in seeking counsel that she will be able "to freely and fully confer and confide in one having knowledge of the law, and skilled in its practice in order that the former [client] may have adequate advice in a proper defense. This assistance can be safely and readily made available only when the client is free from the consequences of apprehension of disclosure. . . "Baird v. Koerner, 279 F.2d 629 (9th Cir. 1960) (attorney-client privilege prevents attorney from divulging identity of client who had anonymously turned in "conscience" money to the attorney for transfer to the Internal Revenue Service).

The Ninth Circuit majority decision below only pays lip service to the legitimate expectation of privacy which a client has in making communications to counsel, citing United States

v. Kasmir, 499 F.2d 444, 453 (5th Cir. 1974). This legitimate client expectation of privacy concerning all communications with her attorney is buttressed by the strict ethical rules guiding professional conduct of the practicing attorney. For example, Mr. Michaelson, licensed to practice in the State of California, has the following legal restrictions which preclude without exception his divulging the secrets and confidences of his client:

> (1) California Business and Professions Code § 6068(e): "It is the duty of an attorney: . . . (b) to maintain inviolate the confidence, and at every peril to himself to preserve the secrets, of his client." (Emphasis added)
>
> (2) California Code and Civil Procedure § 1881: "There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the following cases: . . . 2. An attorney can not, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment; nor can an attorney's secretary, stenographer, or clerk be examined, without the consent of his employer, concerning any fact the knowledge of which has been acquired in such capacity." (Emphasis added)
>
> (3) California Business and Professions Code § 103: ". . . any violation of the oath taken by him, or his duties as such attorney, constitute causes for disbarrment or suspension."

(4) American Bar Association Ethical Consideration E-C 4-4: "The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge. A lawyer should endeavor to act in a manner which preserves the evidentiary privilege; . . . a lawyer owes an obligation to advise the client of the attorney-client privilege and timely to assert the privilege unless it is waived by the client."

(5) American Bar Association Disciplinary Rule 4-101 (B): "Except as permitted. . . . , a lawyer shall not knowingly: (1) Reveal a confidence or secret of his client."

(6) American Bar Association Cannon 37: "Confidences of a Client: It is the duty of a lawyer to preserve his client's confidences."

(7) American Bar Association Opinion No. 287 (1953): "A lawyer's duty to preserve confidences of his clients transcends even his duty to disclose perjury resulting in a judgment otherwise unobtainable."

(8) An attorney should elect to go to jail and take his chances on release by a higher court rather than divulge communications of his client. People v. Kor, 129 Cal. App. 2d 436, 447, 277 P. 2d 94, 101 (1954) (on court order, an attorney for a

defendant in a criminal case testified as to conversations with his client after the claim of privilege had been overruled; the defendant's conviction was reversed for the erroneous denial of the privilege claim, the appeals court stating that the attorney "should have chosen to have gone to jail and take his chances of release by a higher court. . . . [I]t is, . . . a suggestion to any and all attorneys who may have the misfortune to be confronted by the same or a similar problem."

(9) "The lawyer client privilege is, indeed, so extensive that where a person seeks the assistance of an attorney with a view to employing him professionally, any information acquired by the attorney is privileged whether or not actual employment results. [citation omitted]" People v. Canfield, 12 C. 3d 699, 705 (1974) (statements made by client to public defender concerning financial status were privileged). See also California Evidence Code § 952.

The majority opinion below "failed to see how the specific information requested can be considered a confidential communication" under Nevada law to be protected by the attorney-client privilege, (slip opinion at 8) at least absent "incriminating circumstances." (Id. at 9) Totally ignored is the bold fact that the requisite "incriminating circumstances" were provided by the concession that the responses to the grand jury questions by petitioner concerning fee arrangements and referral were to be used, if at all possible, by the government in a prosecution of Ms. Sibson.

Instead of a discussion of the peculiar facts before it, the majority opinion outlines general

policy reasons why court inquiry into fee arrangements and referrals is necessary to avoid excessive fees and conflicts of interest. (Id. at 10) As a statement of policy, [4] the language of the opinion is proper. However, it has nothing at all to do with the instant case. The district court had no part in formulating the questions awaiting petitioner. No claim had been made concerning conflicts of interest or fee gouging. The facts of this case solely demonstrate that the government attorney desired to use petitioner's responses to grand jury questions as evidence in a subsequent prosecution of his client. There can be no stronger case for a defense attorney's declination to testify than when the grand jury process is being used by a prosecutor to gain pre-

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[4] The grand jury is hardly the appropriate place for preliminary inquiry concerning fees or possible conflicts of interest. Nor was there any concern expressed for such matters at the district court level. If there had been, a simple admonishment to the client concerning her rights would have sufficed since conflicts are waivable and excessive fees non-collectable. Or, the court could have held an in camera hearing with the attorney to inquire into both matters without the possibility of use of the attorney's answers by the prosecution to incriminate the client. This by no means exhausts the alternatives available; the point is that they exist and would not place an attorney in the impossible posture of testifying before a grand jury as to client communications for use in a criminal prosecution.

trial discovery against the attorney's client. That is what happened below.

While distinguishable in some respects, an analogous situation to this case was presented in United States Securities & Exchange Commission, 226 F.2d 501 (6th Cir. 1955), where a lower court held in contempt the General Counsel for the SEC for declining to produce confidential intra-agency reports of the Commission's based upon the Commission's rules of privilege. In setting aside the judgment of contempt, the Court stated that even if wrong in asserting a claim of privilege "An attorney is entitled to consideration of a claimed privilege not to disclose information which he honestly regards as confidential and should not stand in danger of imprisonment for asserting respectfully what he considers to be lawful rights." Id. at 520. It is interesting to note that the General Counsel asserted the SEC's privilege in his own behalf and the Court upheld his right to do so; in the case at bar, petitioner also respectfully asserted a privilege for his client, yet petitioner was held in contempt and ordered incarcerated.

In re Marshall, 423 F.2d 1130 (5th Cir. 1970), the Court noted that the power of holding an attorney in contempt is broad but that certain guidelines should be followed. In contempt cases against lawyers, the Court stated that all of the evidence must be carefully examined in order to insure that there is "no undue interference with the attorney-client relationship." The Court cited Parmelee Transportation Company v. Keeshin, 294 F.2d 310, 313 (7th Cir. 1961) for the proposition that the contempt power must be invoked sparingly and only when clearly demonstrating conduct that is contumacious and tending to bring the administration of justice into disrepute as opposed to conduct that is of a "determined level-

headed practitioner who is acting respectfully to the court under considerable pressure in a lengthy and important trial."

In the recent decision of this Court in Maness v. Meyers, ___ U.S. ___ (1975), an attorney's contempt citation for advising his client to assert the Fifth Amendment privilege during a civil suit was overturned. Here, the attorney, acting in a professional manner, asserted the Fifth Amendment privilege, among others, on behalf of his client. [5] The language and holding of Maness v. Meyers are equally applicable here:

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[5] In several circumstances, the attorney for the privilege-holder may assert the privilege on behalf of his client. See Brody v. United States, 243 F.2d 378, 387 (1st Cir.), cert. denied 354 U.S. 923 (1957) (attorney appearing before court as counsel permitted to object to a proposed order on the ground that it would compel his client to incriminate himself). In Application of House, 144 F. Supp. 95 (N.D. Cal. 1956) the court held that the attorney could assert his client's Fifth Amendment privilege, noting that any other decision would result in the client's waiving his constitutional rights unless he himself participated in all proceedings with the attorney. (Id. at 100) In House, the court did not make a distinction between the possession of privileged documents by the attorney or the client. The court apparently equated the physical possession of the documents by the attorney in the course of his employment as possession in a personal capacity by the client himself.

"An early example of this situation is found in In re Watts & Sachs, 190 U. S. 1 (1903). There lawyers advised their clients in good faith that state not federal courts had bankruptcy jurisdiction over a certain property in the hands of a state receiver. This advice led to a collision between the state and federal courts, and contempt citations for the lawyers. Although this Court held that the lawyers' advice was substantively incorrect it refused to allow the federal contempt convictions to stand because there was no evidence the advice was given in bad faith. 190 U.S., at 32. Chief Justice Fuller, speaking for the Court, said:

> "'In the ordinary case of advice to clients, if an attorney acts in good faith and in the honest belief that his advice is well founded and in the just interests of his client, he cannot be held liable for error in judgment. The preservation of the independence of the bar is too vital to the due administration of justice to allow the application of any other general rule.' 190 U.S., at 29.
>
> "We conclude that an advocate is not subject to the penalty of contempt for advising his client, in good faith, to assert the Fifth Amendment privilege against self-incrimination in any proceeding embracing the power to compel testimony. To hold otherwise would deny the constitutional privilege against self-incrimination the means of its own implementation. When a witness is so advised the advice becomes an integral part of the protection accorded the witness by the Fifth Amendment."

Here, the petitioner's client had been granted use immunity for subsequent testimony before the grand jury. Subsequently, the prosecutor informed petitioner that he would be subpoenaed to testify concerning the matters testified to by his client. If there were discrepancies in the testimony, his client would be prosecuted for perjury. If not, the testimony might be used to implicate her on substantive offenses. The petitioner was certainly within the law in declining to answer grand jury questions under these circumstances based upon Fifth[6] and

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6 "In addition to hindering preparations, requiring an attorney not only to identify his client but also to divulge information that might provide a sufficient basis for a subsequent indictment by the grand jury would place him in the anomalous position of being a witness against his own client. Moreover, the knowledge that the attorney-witness has been retained to prepare for possible criminal charges might give rise to an inference of client guilt consciousness that would render the grand jurors less capable of making an objective determination of the occurrence of a criminal violation and the complicity of the client. Thus it is arguable that the client's act of retaining counsel before charges against him have been filed is testimonial in nature, and because retention of counsel might readily be construed by the grand jurors as an admission of guilt, the attorney cannot be compelled to testify without infringing his client's Fifth Amendment privilege against self-incrimination. "Criminal Procedure-Grand Jury-Attorney Work Product Consisting of Written Statements and Personal Recollection of Interviews is Privileged Against Disclosure at Federal Grand Jury Investigation," 26 Vanderbilt L. Rev. 1078, 1088 (1973).

Sixth Amendment[7] grounds as well as the attorney-client privilege[8] and the reasonable expectations

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6 cont'd "The attorney might argue successfully, however, that because disclosure of the identity of his client would lead ultimately to disclosure of the client's motive for seeking legal advice and because the client motive is within the purview of communications protected by the attorney-client privilege [citation], the client's identity need not be revealed. See Tillotson v. Boughner, 350 F.2d 663 (7th Cir. 1965) (client's identity is within the attorney-client privilege when that identity is the essence of a confidential communication)." Id. at n. 50.

7 The Fifth Amendment is a broadly drawn constitutional privilege which is not especially geared to the peculiarities of the attorney-client relationship. However, there are Sixth Amendment "right to counsel" reasons for protecting the relationship. See Coplon v. United States, 191 F.2d 749 (D.C. Cir. 1951), cert. denied 342 U.S. 926 (1952).

8 The attorney-client privilege is of ancient origin based upon the fundamental premise that the "necessity of ensuring the right of every person to freely and fully confer and confide in one having knowledge of the law, and skilled in its practice in order that the former may have adequate advice and a proper defense. This assistance can be made safely and readily made available only when the client is free from the consequences of apprehension of disclosure. . ." Baird v. Koerner, 279 F.2d 623, 629 (9th Cir. 1960).

of the client in entering such a relationship. [9]

Neither the grant of use immunity to petitioner or his client prevents the assertion of the above grounds as a bar to testimony. Use immunity is constitutional only because it is a protection against self-incrimination which is coextensive with the Fifth Amendment. Kastigar v. United States, 406 U.S. 441 (1972). The grant of use immunity to a client is not a talisman that dissolves all constitutional rights. Here, the use immunity grant to the client is totally subverted by subpoenaing the client's attorney and compelling him to divulge communications from his client. [10]

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[9] "A transfer to a lawyer is protected, not simply because there is a recognized attorney-client privilege, but also because the ordinary expectation is that the lawyer will not further publicize what he has been given. Again in contrast, a transfer to a trustworthy bank or to a clerk of the court does not usually carry with it such expectations." U.S. v. Couch, 409 U.S. 322, 350 (1973)(Marshall, J. dissenting). See also Schwimmer v. United States, 232 F.2d 855, 863 (8th Cir. 1956) ("the attorney has the duty . . . to make assertion of the privilege, . . . as a matter of professional responsibility.")

[10] The grant of use immunity to petitioner is irrelevant since he indicated that answering questions would not incriminate himself. (slip opinion at 6) In any case, where the immunity is not coextensive with the Fifth Amendment privilege, testimony may not be compelled: "If, . . . the immunity granted is not as comprehensive as the protection afforded by the privilege, petitioners were justified in refusing to answer, and the judgment of contempt must be vacated. McCarthy

In addition to rendering the use immunity grant to the client meaningless, compelling the attorney to testify against his client based upon communications during the formation of the attorney-client relationship undermines the Sixth Amendment right to counsel. Use immunity is irrelevant to the Sixth Amendment and other protections of the attorney-client relationship: "Use immunity overcomes only those testimonial privileges based on self-incrimination. The witness may well have

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10 cont'd v. Arndstein, 266 U.S. 34, 42 (1924)." Kastigar, supra at 449.

The most serious defect of Michaelson stems from the fact that the client had received only use immunity rather than transactional immunity. She clearly retained a Fifth Amendment privilege with respect to any other source of the same information. She is still vulnerable to prosecution, with the sole limitation that her own coerced testimony and its fruits cannot be used against her. The government can easily show that it had knowledge of the identity of her lawyer from a source completely independent of her. If his testimony differs from hers, she can be charged with perjury. If it is the same, the facts can be proved with an assurance that Sibson cannot contradict them. This failure to recognize the identity of interest of attorney and client is perhaps the opinion's fundamental error. The grant of use immunity to the client simply does not permit extraction of client communications from her attorney.

other statutory and constitutional claims which the court could consider at the pre-testimony hearing." Note, "Federal Witness Immunity Act: Expanding The Scope of Pretestimony Judicial Review," 5 Loyola Univ. L. Jour. 490 (1974).

The primacy of the attorney-client relationship in the analogous context of the government's power to subpoena taxpayer records in the possession of an attorney has been correctly described in United States v. Kasmir, 499 F.2d 444 (5th Cir. 1974), cert. granted 29 January 1975.

> "We are thus faced with this dilemma: If we hold that no fifth amendment privilege is now available, then the taxpayers rights have been effectively decreased by his transfer. In a sense, the taxpayer is better off without an attorney to study the records than with him. . . . the question is whether the taxpayer has a sufficient legitimate expectation of privacy in the summoned records to warrant the label of constructive possession." Id. at 452. "But where the taxpayer transfers potentially incriminating materials which he physically possesses to his attorney pursuant to an attorney-client relationship, the taxpayer's legitimate expectation of privacy with regard to the use of materials should be quite different from his legitimate expectations as to its use in the hands of an independent accountant preparing tax returns. While the accountant has a legal duty to disclose, the attorney has a strict, ethical obligation to prevent disclosure. This ethical obligation is broader than and independent of the attorney-client privilege, which is admittedly not available here. The Disciplinary Rules of the Code of Professional Responsibility prepared by the American Bar Association

absolutely forbid an attorney from knowingly revealing either a confidence or a secret of his client. . . . . but even where there is no attorney-client privilege in certain material, as here, the taxpayer client may still have a legitimate expectation of privacy with regard to that material because of the attorney-client relationship, an expectation of privacy which helps to give substance to a Fifth Amendment privilege contention." (Id. at 453)

The propriety of a prosecutor calling a client's attorney before a grand jury to obtain evidence for a prosecution is open to serious constitutional question[11] for "prosecutors are forced to search for independent evidence instead of relying upon proof extracted from individuals by force of law." U.S. v. White, 322 U.S. 694, 698 (1944).

It is no argument for the attorney to simply testify in the face of threats of contempt and later appeal. Once the protected information is revealed it cannot be retrieved:

"[o]nce the witness has complied with an order to testify, he cannot thereafter retrieve the information involuntarily revealed, even if it subsequently develops that compelling

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[11] Once a person is a target for indictment, it is improper to use the grand jury to subpoena the individual for discovery purposes. Cf. United States v. Star, 420 F.2d 1214 (9th Cir. 1972). Calling the individual's attorney to compel testimony to incriminate the client would be equally improper.

the testimony violated constitutional rights. In such a predicament, the damage is irreparable. No remedies are available which can effectively cure the constitutional deprivation after the order has been unwillingly obeyed." United States v. Dickinson, 465 F. 2d 496, 512 (5th Cir. 1972) (footnote omitted); see also Hoffman v. United States, 341 U. S. 479, 486-87 (1951).

To penalize an attorney in this extraordinary circumstance for protection of his client's interests subverts the guarantees afforded by the Fifth and Sixth Amendment. The problem is aggravated where one Circuit recognizes the impropriety of compelling an attorney to violate his ethical obligations to his client (United States v. Kasmir, supra at 453)[12] and another does not, e. g., the opinion below. Where there is doubt in the law as to what an attorney's responsibilities are, this Court has made clear[13] that the attorney must decide in favor of the client and not his own

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12 See also In re Terkeltoub, 256 F. Supp. 683, 684 (S. D. N. Y. 1966), where an attorney and client were suspected of witness tampering, the court refused to compell the attorney's testimony about an illegal meeting between the attorney, client, and the witness finding "that the attorney was not only entitled, but probably required to withhold answers to the grand jury's questions." (Emphasis added)

13 "The American Bar Association Project on Standards for Criminal Justice, Standards Relating to the Defense Function shows the difficulty such a situation would present for a lawyer.

". . . the duties of a lawyer to his client are to represent his legitimate interests, and

personal or professional interest.

Every client is entitled to his counsel's zealous protection of attorney-client communications, secrets and the continuity of the relationship itself. If rules are adopted which permit counsel to be held in contempt for refusals to testify against his own client in a situation such in this case, [14] counsel will be faced with the obvious predicament of a conflict-of-interest between the disposition of his client's case and the very real possibility of himself being subjected to

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13 cont'd consideration of personal and professional advantage should not influence his advice or performance." Standards Relating to the Administration of Justice, 1974 Ed., at 120.

"The introductory comments note that: "A lawyer cannot be timorous in his representation. Courage and zeal in the defense of his client's interest are qualities without which one cannot perform fully as an advocate." Id., at 109-110." Quoted in Maness v. Meyers, supra, n. 16 (1975).

14 There may be isolated instances where the attorney would be lawfully compelled to testify against a client as where counsel witnesses his client attempting escape during an interview or where the latter assaults custodial personnel in front of counsel. These examples, unlike this case, are separate and apart from the attorney-client relationship.

contempt and its resultant penalties. The choice would be between attorney self-interest and the best interests of his client. To place counsel in such a position denies the client's right to the effective representation and the lawyer of his choice as commanded by the Sixth Amendment. A concommitant effect is the destruction of the confidential relationship between attorney and client.

The dilemma for the attorney is compounded where his compelled testimony, should he elect to give it, breaches his ethical obligations to the client and may lead to disciplinary action against him. It is further aggravated by the knowledge that if the case originated in California, where petitioner is licensed and practices, the rules of privilege would have protected his refusal to testify.[15] It would be an anomolous and precarious

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15 The opinion below cites Baird v. Koerner, supra, for the proposition that state law on attorney-client privilege governs the applicable law. But cf. Heathman v. United States District Court, 503 F.2d 1032, 1034 (9th Cir. 1974). The weight of authority is contra, see, e.g. ". . . questions of privilege in a federal income tax investigation are matters of federal law." Colton v. United States, 306 F.2d 633, 636 (2d Cir. 1962).

The new proposed Federal Rules of Evidence purposely were stripped of rules concerning privilege in order to avoid the mischief this case exemplifies concerning whether federal or state rules apply: "The formulation adopted by the House is pregnant with litigious mischief. The committee has, therefore, adopted what we believe will be a clearer and more practical guideline for determining when courts should respect State rules of privilege. Basically, it provides that in

state of the law to allow federal prosecutor's to subpoena lawyers before grand juries in states where the privilege is weakest. Such an abuse of the grand jury subpoena process may only be eliminated by applying a standard federal rule such as is mandated by Proposed Federal Rules of Evidence § 501. [16] Since federal policy is being furthered, federal rules should apply to the rules of privilege concerning a federal court's contempt citation for an attorney's refusal to testify against his client before a federal grand jury.

Under any rationale application of the

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15 cont'd criminal and Federal question civil cases, federally evolved rules on privilege should apply since it is Federal policy which is being enforced." Report of the Committee on the Judiciary of October 18, 1974, 93d Cong., 2d Sess, Report No. 93-1277, p. 12.

16

Article V. Privileges

Rule 501. General Rule

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State,

attorney-client privilege, (California, Nevada[17] or federal[18] common law) the questions asked petitioner, under this unique fact situation, called for answers concerning privileged communications.

CONCLUSION

The majority decision in Michaelson places the Ninth Circuit directly in conflict with the Fifth Circuit decision in United States v. Kasmir, supra for which a petition for a writ of certiorari was granted on 29 January 1975. 16 Cr. L. 4162. On the same day, certiorari was granted to review the decision in United States v. Fisher, 500 F. 2d 683 (3rd Cir. 1974), another taxpayer-transfer-of-records-to-his-attorney case. This case presents issues far more substantial than either Kasmir or Fisher. The practice of subpoenaing an attorney

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16 cont'd or political subdivision thereof shall be determined in accordance with State law.

17 California and Nevada statutes concerning attorney-client privileged communications are almost identical. See Pet. at 24-27. Section 1, Rule 179 of the Rules of the Supreme Court of Nevada prohibits an attorney from disclosing client secrets and confidences. California has the same rule. See this brief supra at 6-7.

18 Chirac v. Reinicker, 24 U. S. (11 Wheat.) 280, 294-295 (1826) (the fact of a retainer by a certain party for a certain purpose is a confidential communication).

before the grand jury to testify as to client communications concerning the fees to create the relationship is nationwide and occurs with disquieting frequency. E.g., United States and Joseph H. Romine, Special Agent Internal Revenue Service v. Frank E. Haddad, Civil No. 74-377 L[A] (W.D.Kty. 1974) (now on appeal to the Sixth Circuit). The majority Michaelson opinion now sanctions this practice. The dissent of Circuit Judge Merrill concisely frames the correct judicial approach to the problem.

> "I cannot, then, agree that the only limits upon what a court may require an attorney to divulge respecting his client are those prescribed by privilege and the Fifth Amendment. Where ethical considerations intervene, surrender of the information to the Government should no longer be regarded as a matter of unquestionable governmental right. Public need to obtain the information from this source should not be blindly accepted without giving consideration to the interests represented by the attorney-client relationship, and a court order should be the result of an exercise of judgment seeking to reconcile the competing interests. Absent some showing of weighty governmental need of this information from this source, in my judgment the order should not have issued." Slip opinion at 19. (Emphasis added)

The consequences for petitioner and the entire bar resulting from allowing the opinion below to stand may well prove disasterous. The opinion fails to recognize that "a grand jury subpoena is [not] some talisman that dissolves all constitutional protections." United States v. Dionisio, 410 U.S. 1 (1973). For the attorney who conscientiously seeks to follow the ethical

dictates of his profession and the Constitution, as did petitioner below, the Hobson's choice of contempt and jail, or testifying and breaching his duty to his client is untenable.

Further, the direct consequences to petitioner for his conduct in preserving his client's confidences, trust and the relationship itself, are grave. More than a jail sentence and loss of his ability to practice are at stake, for his

> ". . . conviction for contempt presumably could be used for impeachment and sentencing purposes in any future criminal proceeding. This conviction would be especially damaging if . . . [he] were ever again accused of being in contempt of court. Conviction for contempt of court could also have serious adverse career consequences for . . . [him]. His conviction could provide a basis for disciplinary action by a bar association. Opportunities for appointment to the bench or to other high office might be foreclosed as a result of this blot upon his record. The conviction might damage . . . reputation in the legal community, and this in turn might affect his ability to attract clients and to represent them effectively, especially in open court." In re Butts, 493 F. 2d 842, 844 (5th Cir. 1974)

The dismal irony of witnessing an attorney disciplined by the bar because of a contempt citation for refusing to testify against his client, or alternatively disciplined for failure to preserve his client's confidences, secrets and trust cannot be lost upon this Court. All this, of course, is

in store for petitioner individually. However, the issues raised by his petition for certiorari are of such grave consequence to every lawyer in this nation, that this Court should grant his petition and hear this case on the merits.

Respectfully submitted,

DATED: 3 April 1975

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